STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
H. WHITE, P.J., D. SAWYER, and H. SAAD, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

Supreme Court
No. 120021

STEPHEN J. MCNALLY,

Defendant-Appellant.
_____/

Court of Appeals No. 223059
Circuit Court No. 1999-165135 FC

BRIEF ON APPEAL-APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE

INDEX TO AUTHORITIES CITED

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

COUNTER-STATEMENT OF QUESTION PRESENTED

I. WHETHER DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE THE PROSECUTOR PROPERLY ELICITED TESTIMONY FROM POLICE OFFICERS REGARDING PRE-ARREST OR PRE-*MIRANDA* SILENCE ON THE PART OF DEFENDANT?

Defendant contends the answer should be, "yes."

The People contend the answer is, "no."

COUNTER-STATEMENT OF FACTS

Stephen J. McNally, hereinafter referred to as Defendant, was charged in this case with one count of first degree premeditated murder, contrary to MCL 750.316, and one count of failure to stop at the scene of a serious personal injury accident, contrary to MCL 257.617. Following a jury trial before the Honorable Rudy J. Nichols of the Oakland County Circuit Court, Defendant was found guilty of the lesser offense of second degree murder, contrary to MCL 750.317, and of failure to stop at the scene of a serious personal injury accident. On September 24, 1999, Judge Nichols sentenced Defendant to 20 to 50 years incarceration for his second degree murder conviction and two to five years incarceration for his failure to stop conviction. In an unpublished opinion per curiam, a panel of the Court of Appeals affirmed Defendant's conviction and sentence. In an order dated October 30, 2002, this Honorable Court granted Defendant's application for leave to appeal, limited to Issue I of the application (claim of improper reference to Defendant's silence). *People v McNally,* 467 Mich 896 (2002).

Marsha Becker's best friend was Harold Van Dorn. (1-2b.) She had met him three years earlier "through a 12-step program." (2b.) Although Van Dorn was divorced, he had four children. (2b.) For awhile, Van Dorn lived with Becker and her husband. (3b.) When Van Dorn started to struggle with his alcoholism (around Thanksgiving of 1998), Becker asked him to leave the home because she could not have that kind of behavior around her or her children. (3b.) Nonetheless, Becker and Van Dorn remained friends. (4b.)

Timothy Barron worked as a roofer for Renovations Roofing and Remodeling. (34a.) Harold Van Dorn also worked for Renovations as a roofer. (35a.) Van Dorn and Barron were friends. (35a.) Van Dorn moved in with Barron (who was staying at a friend's home) in

November or December of 1998. (36a.)

On February 10, 1999, at approximately 3:00 p.m., Barron and Van Dorn walked to Augie's, a tavern/grill located in Madison Heights. (36-38a.) The tavern was not "real crowded" as there were only 10 to 15 people in the tavern. (38a.) Barron and Van Dorn sat at the bar and ordered bottled Budweiser beer. (38-39a.) Barron and Van Dorn played pool during the course of several hours that they spent at Augie's. (39a.) At one point, Barron saw Defendant sitting across the bar from them. (39-40a.) Barron motioned to Defendant and asked him if he wanted to shoot pool. (40a.)

Barron, Van Dorn, and Defendant then went over to a pool table and each shot a game of pool. (41a.) During the course of playing pool, all three individuals were drinking beer. (41a.) Barron thought that Defendant "[s]eemed like a good guy. (42a.) The three men got along and Barron did not notice any problems between Van Dorn and Defendant. (42a.)

At about 6:30 or 7:00 p.m., Barron and Van Dorn began walking home from Augie's. (43a.) Defendant came out of Augie's and called to them. (43-44a.) Barron and Van Dorn walked back to Defendant's truck. (44a.) Defendant gave them a ride home. (43a.) On the way to Barron and Van Dorn's home, the three men stopped at "Wally's" and Van Dorn bought a 12-pack of Budweiser beer. (44a.) The ride was uneventful. (45a.)

When they arrived at the home (in Madison Heights), the three men went inside and began drinking the beer. (45a.) They also drank shots of Schnapps. (47a.) As Barron and Defendant were both ex-Marines, they "seemed to hit it off . . . ." (46a.) Van Dorn also got along with Defendant. (46a.)

At approximately 7:30 or 8:00 p.m., Van Dorn and Defendant left the home to go to another bar. (47-48a.) While Defendant was still amiable, Van Dorn was not in a "good mood."

(50a.) Both Van Dorn and Defendant appeared "buzzed" from the drinking they had done. (50-51a.) After they left, Barron went to sleep. (49a.)

Brenda Lee Zapton worked at Telway Hamburgers located at Eleven Mile Road and John R in the City of Madison Heights. (52-53a.) On the evening of February 10, 1999, Zapton and Linda Sutton were working at the "carry-out" window in the restaurant. (54-55a.) Between 10:30 and 11:00 p.m., Harold Van Dorn (a regular customer) and Defendant (whom Zapton had never seen before) came into the restaurant. (55-56a.) Van Dorn placed an order for eight cheeseburgers to go. (56-57a.) After placing the order, Van Dorn and Defendant spoke with each other and appeared to be "laughing and joking."[1] (57-58a.) When the order was ready, Van Dorn and Defendant walked out of the restaurant. (58a.) Zapton saw Defendant get into the driver's seat of a brown truck while Van Dorn got into the passenger seat of the truck. (58a.)

On February 10, 1999, John Dalling was working for Hungry Howie's Pizza in the City of Madison Heights (located between Twelve and Thirteen Mile Roads on John R) as a delivery driver. (61-62a.) At approximately 11:30 p.m., Dalling was in front of the restaurant about to get into his car to make a delivery. (63a.) At that point, he noticed a man (holding a cowboy hat in one hand and a coffee mug in the other) stumbling in the center (turn) lane of John R and heading towards a crosswalk. (65- 68a; 7b.)

Dalling then saw a brown and white truck in one of the northbound lanes of John R pull alongside of the man "for a brief second." (68a.) He saw the truck accelerate down the road about 80 to 85 yards and then make a "pretty powerful" U-turn.[2] (69-70a.) The truck got into the

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[1] Zapton testified that she was able to see Defendant's face and did not notice any cuts or blood on his face. (5b.)

[2] Dalling testified that he did not notice any problems with the truck as it drove. (69a.)

curb lane of southbound John R and then "went straight at him [Van Dorn], across both lanes and went into the middle turning lane and hit him head on." (70a.) The truck accelerated as "if he just gunned it." (70a.) Dalling did not hear any breaks or tires squealing. (71a.) He did not see the truck make any attempt to swerve away from the man. (71a.) Dalling thought that the truck was traveling 40 to 45 miles per hour at the time it hit Van Dorn.[3] (71a.) Although he had a view of the back end of the truck, he did not see any brake lights come on as the truck hit Van Dorn. (72a.) When Van Dorn was hit, he "flew quite a few feet and rolled up into the northbound lanes, closest to the curb." (71-72a.)

Dalling ran back into the Hungry Howie's and yelled, "call 9-1-1, somebody's been hit." (73a.) He ran right back out again and saw the taillights of the truck several hundred yards down the road. (73a.) Dalling saw a passing driver get out of his vehicle and go up to Van Dorn. (74-75a.)

Matt Walsh was driving his company's truck on northbound John R between Twelve and Thirteen Mile Roads at approximately 11:15 p.m. (79-80a.) At that time, he saw "some headlights veer very sharply and . . . saw something go over the hood"[4] of a vehicle in the center turn lane. (81-82a.) As Walsh drove a bit further, he realized that there was something in his lane in front of his truck. (83a.) Walsh stopped his truck and realized that there was a person laying in the street. (83a.)

Walsh parked his truck in the street and got out of his vehicle. (83-84a.) The person [Van Dorn] in the street was "wiggling and moaning." (84a.) Walsh wanted to place something under

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[3] Dalling testified that the area was "[p]retty well lit." (6b.)

[4] Walsh testified that he subsequently realized that the "swerve" had in fact been an impact. (9b.)

Van Dorn's head, but was afraid of causing further injury. (84a.)

As Dalling watched, the driver of the truck that hit Van Dorn made a second U-turn (he could hear the tires squealing this time) and began to drive back towards the scene at a high rate of speed so that Dalling thought that "he was coming back do it again." (75-76a; 8b.) Upon seeing this, Dalling started telling everybody to get out of the way. (76a.)

Walsh heard Dalling's warning and looked around. (84-85a; 10b.) He saw that the brown pick-up truck was driving towards the scene in the middle turn lane and, when it came by the scene, slowed to a "walking" speed. (85a.) It then drove away, accelerating "mildly" and gradually increasing its speed. (85a.)

Dalling saw the truck pass by Van Dorn driving around 10 or 15 miles per hour (as many of those driving by the scene were doing). (76a.) The truck then proceeded northbound on John R at a "normal speed." (77a.) Dalling saw the truck stop at a red light located at John R and Thirteen Mile Road. (78a.)

Sergeant Robert Hillman, Officer Robert Backlund, and Officer Richard Cacicedo of the Madison Heights Police Department were dispatched to the scene. (87-88a, 94a, 11b.) Sergeant Hillman contacted Officer Michael Siladke, who also proceeded to the area of 13 Mile Road and John R. (141-142a.) Sergeant Hillman and Officer Backlund arrived at the scene at the same time. (89a, 95a.)

Dalling ran out in the road and told Sergeant Hillman, "I've got a visual on this guy that hit this guy. It's in that truck right there." (78a, 95-96a.) Walsh also gave a description of the vehicle to the police. (86a.) Sergeant Hillman saw a pair of tail lights stopped at the red traffic signal at 13 Mile Road and John R. (97a.)

Officer Backlund saw Van Dorn lying on his stomach across both lanes of northbound

John R. (90-91a.) There was a pool of blood by his head and his feet were pointed inward and touching each other (leading Officer Backlund to believe that the victim's legs had been broken). (91a.) Officer Backlund asked Van Dorn for his name, but he only responded by making a slight grunting noise. (91a.)

Sergeant Hillman told Officer Backlund to stay with the victim. (97a.) He then made a U-turn and proceeded northbound on John R. (97a.) He heard from two officers (Officer Cacicedo and Siladke) that they had the truck in sight. (97a, 142-143a, 11-12b.) Sergeant Hillman, Officer Cacicedo, and Officer Siladke saw the light turn green for northbound traffic on John R and the pick-up truck proceed forward. (98a, 143a.)

All three police vehicles activated their emergency equipment and attempted to stop the pick-up truck. (98a, 12b.) However, the pick-up truck continued driving northbound on John R at about 25 to 35 miles per hour. (98a, 12b.) It proceeded for a quarter of a mile to a half of a mile until it finally pulled into the parking lot of Comp USA. (99a, 113a, 12b.)

Sergeant Hillman exited his patrol vehicle, approached the passenger door of the pick-up truck, opened it, and ordered the driver to shut off the vehicle. (99a.) Defendant, who was the driver of the vehicle, followed Sergeant Hillman's order. (99-100a.) Sergeant Hillman then ordered Defendant out of the pick-up truck. (100a.) Defendant immediately stepped out of the truck. (100a.) Officer Cacicedo noted that Defendant lost his balance as he exited the truck. (113a.)

Officer Cacicedo put Defendant up against the truck to secure him and pat him down. (113-114a.) He noted that Defendant had a strong odor of intoxicants coming from him. (114a.) Officer Cacicedo asked Defendant if he had been drinking. (115a.) Defendant replied that he had been to Augie's. (115a.) Officer Cacicedo noted that Defendant's speech was slurred, but the

officer could understand him and his responses were appropriate. (115a.)

Sergeant Hillman noted that Defendant smelled of intoxicants, that his eyes were red and watery, and that his speech was slurred. (101a.) He noted that Defendant had an abrasion on his right cheek and some blood around his upper lip. (106a.) Sergeant Hillman instructed Officers Siladke and Cacicedo to begin conducting field sobriety tests. (101a.)

Defendant agreed to perform the sobriety tests. (115a.) Officer Cacicedo asked Defendant if he had graduated high school and if he knew the English alphabet. (116a.) Defendant responded, "yes." (116a.) Officer Cacicedo then asked Defendant to recite the alphabet. (116a.) Defendant got up to the letter "R" and then "messed up." (116a.) Officer Cacicedo then asked Defendant to try again. (117a.) Defendant again erred after the letter "R." (117a.) Defendant also failed the "finger count" test. (117-118a.) He did not do well on the "heel to toe" test, at one point losing his balance (although he did not have to be caught by the officers in order to prevent him from falling to the ground). (118-119a.) After these tests, Officer Cacicedo came to the conclusion that Defendant was intoxicated. (119a.)

Officer Cacicedo read Defendant his "preliminary breath test" rights. (120a.) He then gave Defendant the PBT, with a result of .207.[5] (120a.)

Sergeant Hillman examined Defendant's vehicle. (102a.) He noticed "what appeared to be a crumpled up cowboy type hat in the front grill of the vehicle." (102a, 111a.) He also noted some small blood splatters. (102a.) When he examined the interior of the vehicle, he noted that it was in a "disheveled condition." (105a.) There were burgers and wrappers for the burgers spilled

[5] Officer Cacicedo testified that, while this was twice the legal limit, Defendant was not "falling down drunk." (120-121a.) He added that he had seen people more intoxicated than Defendant (and with higher PBT results). (121a.)

out on the front seat of the truck. (105a, 112a.) There was a "crumpled up" blanket on the front seat. (105a.) There was also a bowling ball (without a bag) and some tools in the truck. (112a.)

Officer Cacicedo advised Defendant that he was under arrest and placed him in a patrol vehicle. (126a.) Defendant stayed awake as he was transported and did not fall over in his seat or vomit. (127a.) Once at the police station, Officer Cacicedo took Defendant's property away from him and placed him in a jail cell. (127a.)

At the Madison Heights Police Department, Officer Siladke advised Defendant of his chemical test rights.[6] (144-145a.) Officer Siladke also gave Defendant a form which advised him of these rights. (145a.) Defendant then signed the form and agreed to take a breathalyzer test. (146-147a.) Defendant was given two breathalyzer tests. (149a.) The first test, taken at 12:04 a.m., yielded a result of .21. (150a.) The second test, taken at 12:05 a.m., yielded a result of .20. (150a.)

Officer Cacicedo then prepared a search warrant to obtain a sample of Defendant's blood. (127a.) After the search warrant was signed, Officer Cacicedo transported Defendant to Madison Community Hospital where a nurse drew two vials of blood from Defendant at 1:20 a.m. (128a.) Testing of the blood revealed that Defendant had a blood alcohol level of .20. (128a.)

Officer Cacicedo transported Defendant back to the police station. (129a.) When he was walking Defendant back to his cell, Defendant asked Officer Cacicedo, "you don't like doing this part of the job[?]" (129-130a.) Officer Cacicedo responded, "not this part." (130a.) Defendant then stated, "well I'm pretty much well [sic] fucked ain't I?" (130a.) Officer Cacicedo

[6] According to Officer Siladke, chemical test rights "advise the person that was arrested, basically the circumstances of his arrest and possible penalties of either taking or not taking the chemical test offered." (145a.)

responded, "yes." (130a.)

In the meantime, Officer Richard Lochbiler of the Madison Heights Police Department, examined Defendant's vehicle and the crime scene and collected evidence. (151a-158a.)

The next day (February 11th) at approximately 1:30 p.m., Sergeants Bruce Cupp and George Jorgenson of the Madison Heights Police Department took Defendant from his cell to an interview/conference room in the department. (179-180a.) They offered Defendant a preliminary breath test and he agreed to take it. (180a.) The results of the test indicated that there was no alcohol in Defendant's system at the time. (180a.) Sergeant Jorgenson advised Defendant of his *Miranda*[7] rights. (180-181a.) He asked Defendant if he understood his rights. (181a.) Defendant responded that he did. (181a.) Defendant further indicated that he was willing to waive his rights and speak with the officers. (181a.) Defendant signed a form indicating that he was willing to waive his rights. (181-182a.) The officers informed Defendant that Harold Van Dorn had died. (183a.) At that point, the officers began audio taping their interview with Defendant. (183a, 185a.)

During the interview, Defendant told the officers that he did not recall stopping at Telway Hamburgers with Van Dorn stating, "Last thing after leaving the bar, about the only thing I remember is him hitting me, after that I remember being pulled over." (19a.) He told the officers that he was in the truck when Van Dorn hit him. (31a.) Defendant told the officers that he was an alcoholic and that he suffered from alcoholic blackouts. (21-22a.) Defendant denied that he had made a pass at Van Dorn or that Van Dorn had made a pass at him leading to a fight in the truck, stating that he was not gay or bisexual. (29a.) The interview concluded after Defendant stated, "I

[7] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

don't remember what happened. Don't remember what happened." (33a.)

Dr. Rubin Ortiz-Reyes of the Oakland County Medical Examiner's Officer performed an autopsy on the body of Harold Van Dorn on February 11, 1999. (132a.)

Dr. Ortiz-Reyes first conducted an external examination of the body. (133a.) He noted a one inch laceration on the right temple and multiple small lacerations on the face. (133a.) He also noted brush abrasions on the chest and abdomen, both knees, the left elbow, the left arm, and the left buttock. (134a.) He noted a two inch laceration on the back of the head. (134a.)

Dr. Ortiz-Reyes then performed an internal examination of the body. (134a.) He noted multiple contusions to both lungs. (134a.) There were contusions in the heart. (134a.) There was a fracture of the spine at the base of the neck. (134-135a.) In addition, there were multiple rib fractures due to compression (which caused the injuries to the lungs). (135a.) There were 500 milliliters of blood in the abdominal cavity resulting from a laceration of the liver that had occurred due to blunt force trauma. (135-136a.) There were fractures of the legs at the level of the knees. (137a.)

Dr. Ortiz-Reyes found that Van Dorn's injuries were consistent with having been struck by a moving motor vehicle. (139a.) He found the cause of the death to be multiple injuries (the damage to the liver could have, on its own, killed Van Dorn) and the manner of death to be homicide. (140a.)

On May 14, 1999, Terrance McGran, supervisor for the motor pool for the City of Madison Heights,[8] examined Defendant's pick-up truck. (159a, 13b.) He had been asked to

[8] At trial, McGran was qualified as an expert in the area of auto mechanics without objection. (159a, 14b.) He noted that he was certified by the State of Michigan in automotive repair, engine repair, automatic transmission repair - auto, manual transmission repair - auto, (continued . . .)

check the steering and brakes of the truck as it related to the operation of the truck. (159a.) McGran drove the vehicle from the impound lot to the DPW garage (or about a distance of 500 yards). (160a.) In driving this distance, McGran applied the brakes and noted that they appeared to function normally. (160-161a.) He also did not have any problems with the steering. (161a.)

When he arrived at the DPW garage, McGran put the truck on a hoist so that he could check the steering and the brakes. (161a.) He examined the ball joints (which allow the front wheels to pivot so that the vehicle can turn) and found that they were worn, but intact. (161a.) He opined that the worn condition of the ball joints would have had very little effect on the truck's ability to turn. (162a.) He also opined that the worn condition of the ball joints would not cause a truck to swerve to the left and right and would have had no effect on the vehicle's ability to accelerate or brake. (162a.)

McGran visually inspected all four brake pads. (135a, 170a.) He found that there was roughly thirty percent of the brake pad left. (163a, 171a.) However, he opined that this would have no effect on the truck's ability to stop.[9] (163a.) He found no evidence of a brake fluid leak. (172a.) He also tested the brakes by taking the truck out of the garage, accelerating across the parking lot, and stepping on the brakes. (163a.) The vehicle came to a stop with no problems. (163a.) He noted that, while the parking brake was inoperative, it would have had no impact on the ability of the vehicle to stop or steer. (164a.)

McGran found that the catalytic converter (which controls the emissions from the

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axle repair - auto, front end steering - auto, brakes - auto, heating and air conditioning - auto, tune-up and performance - auto, diesel engine performance - auto, drive trains - truck, brakes - truck, steering and suspension - truck, and electrical systems - truck. (14b.)

[9] McGran testified that inability to stop might occur if only five or ten percent of the pad had been left. (163a.)

vehicle) was missing. (164a.) However, this would have had no effect on the ability of the truck to brake or steer. (164a.) McGran further noted that the headlights, turn signals, and brake lights functioned. (164-165a.)

McGran examined the steering system of the truck. (165a.) In examining the linkage across the front of the truck, he found "some wear, [but] nothing that would prevent it from operating" or anything that would cause the vehicle to swerve uncontrollably one way or the other. (165a.) He found that the power steering belt was loose, meaning that more force would have to be used to steer the truck. (165a.) However, this would not cause the truck to "jerk" to the left or the right. (165-166a.) McGran found that the power steering fluid was low, but this would only mean that the driver would have use more force to turn the truck. (166a.)

McGran then drove the truck back to the impound yard. (166a.) He had no problems steering the truck or with the truck's brakes. (166a.) He could find nothing which could explain the vehicle accelerating and then swerving to the left and not being able to stop. (166-167a.)

At trial, the prosecution called Dr. Felix Adatsi, a toxicologist employed by the Department of State Police. (15b.) He was qualified as an expert in the field of toxicology without objection. (16-17b.) Dr. Adatsi testified that "alcohol will affect different people differently." (186a, 198a.) He testified that, "[w]ith the level of alcohol .15 through .30, one will begin to see certain specific deficits or certain specific decreases in the ability of an individual to normally connect and to operate the bodily functions with the central nervous system." (187a.) He further testified that a person's inhibitions would be decreased, and it is possibly that "some of them may actually become very beligerent [sic] and angry and quarrelsome at that level." (198a.) In addition, according to Dr. Adatsi, there could be "transient memory loss" at this level of intoxication, meaning that there might be a memory loss for short period of time, after which

the person would be able to recall events that had occurred. (189a.)

Dr. Adatsi testified that blackouts can also occur at this level of intoxication (.15 to .30). However, during such a blackout, certain human functions—such as movement—cease. (190-191a.) He added that, if a person had a true physiological blackout, he would not expect that such a person would be able to drive a motor vehicle and opined that the vehicle would be "off course" until the person came out of the blackout. (191a.) He noted that a person suffering from a true physiological blackout would "[p]robably not" be able to execute a U-turn. (191a.) In addition, he opined that such a person would "[p]robably not" be able to process that a stop light had turned red and be able to stop for that light. (191a.)

Dr. Adatsi testified that, if someone was an alcoholic, he would expect that person to have less impairment of his behavior when intoxicated and, in general, less likely to have memory loss. (192-193a.)

On cross-examination, Dr. Adatsi testified that he had not examined Defendant and did not know his history with respect to alcoholism and alcoholic blackouts. (194a.)

On redirect examination, Dr. Adatsi testified that it would be "a true miracle" if a person suffering from a true physiological blackout would be able to operate a motor vehicle for a distance of two miles. (18b.)

The following colloquy then occurred between Defendant's counsel and Dr. Adatsi on recross-examination:

> Q Would it be possible then for a person suffering a true physiological black out [sic] to be in a car that's moving, he's behind the wheel, to travel a few feet, 75, 50 feet, and the[n] come out of that black out and recover to the extent that he can again operate the car?

A It is possible, particularly if the person is on a long stretch of road with no other vehicles on there. Again, it will be a major coincidence for that to happen.
(19b.)

The defense called Anthony Zolinski to the stand, who was qualified as an expert in the field of automotive mechanics. (20b.) Zolinski, who inspected Defendant's truck, noted that the tread of the front tires was worn in a way that he believed was indicative of a front end alignment problem. (200-201a.) He further opined that a front end alignment problem could "cause a pulling condition" where the vehicle would deviate from its intended path of travel. (201a.)

Zolinski opined that the right front brake pads "were worn right to the replacement level" and noted that "chunks of the pad are missing on the edge . . . ." (201-202a.) He noted that it appeared that the left front brake pads had recently been replaced. (202a.) Zolinski opined that the right front brake pads should have been replaced at the same time to "alleviate any pulling conditions and get nice equal braking operation." (202a.)

Zolinski opined that the rear brake pads were worn to the point that they were "near replacement." (204a.) He noted that, while the brake fluid for the front brakes was at a normal level, the reservoir of brake fluid for the rear brakes was nearly empty leading him to believe that there had a been a brake fluid leak. (204-205a.)

Zolinski testified that, while the brakes were still able to stop the vehicle (by essentially relying on the front brakes), the condition of the brakes "would increase the reaction time between when somebody would step on the brakes and when it would finally start to decelerate the vehicle." (211a.)

Zolinski testified that he found that the power steering belt was "very loose" and that the steering fluid level was low. (213a.)

Zolinski further testified that, as part of his inspection, he intended to drive the truck on John R in the same manner it had been driven on the night of the incident. (211-212a.) Zolinski testified that he did not ultimately do so because, before exiting the impound lot, he could "barely steer the vehicle." (212a.)

Zolinski testified that, as a result of these problems, the "vehicle is very hard to turn" noting that it "steered like a tank" and that he could barely make a U-turn. (214a.)

Zolinski testified that his inspection of the vehicle revealed that the clips holding the throttle cable in place were broken, that there was damage to the fan shroud assembly, that the truck did not have the original air cleaner assembly, and that one of the ignition wires ran through the throttle linkage. (218a.) He noted that, if the ignition wire got entangled in the throttle, "[t]he throttle would be held open or at a faster speed than what the driver intends." (218a.) He also found that the "side" turn signals on the truck were not functioning. (224a.)

Zolinski added that some of these problems would result in the vehicle sounding like it "is really speeding, when really it's not." (218a.) He concluded that the truck "should not be driven on the public street" and called it "basically a death trap." (223a.)

On cross-examination, Zolinski admitted that the truck stopped on each of the dozen or so times that he applied the brakes. (21b, 23b.) He also admitted that the truck never pulled from one lane to another (due to alignment problems) or accelerated on its own when he drove it. (22b.) Zolinski further admitted that he did not find anything that would have caused the vehicle to make a complete U-turn on its own. (23b.)

The prosecution called Thomas Satawa as a rebuttal witness. (228a.) Satawa testified that he was a state certified auto mechanic employed by the City of Madison Heights. (229a.) Satawa was qualified as an expert in the area of auto mechanics. (229-230a.) Satawa accompanied

Anthony Zolinski when he drove Defendant's truck. (230-231a.) Satawa testified that Zolinski did not seem to have a problem driving Defendant's truck. (231a.) Satawa noted that the vehicle stopped when Zolinski used the brakes. (231-232a.) He did not observe Zolinski struggle to steer the vehicle. (232a.) When asked whether Zolinski had any problems in making three or four U-turns, Satawa responded, "[i]t seemed a little tough, but it made the U-turn without a problem." (233a, 24b.)

The jury found Defendant guilty of the lesser offense of second degree murder and of the offense of failing to stop at the scene of a serious personal injury accident. (234a.) Judge Nichols sentenced Defendant to 20 to 50 years incarceration on the second degree murder conviction, and to two to five years incarceration on the failure to stop conviction. (238a.)

The Court of Appeals affirmed. The court rejected Defendant's claim that the prosecutor had improperly elicited evidence from three witnesses concerning his post arrest silence by finding that "[t]he challenged testimony did not concern silence during custodial interrogation or silence in reliance on *Miranda* warnings." (239a; footnote omitted.) The court also found that trial counsel's failure to object to this testimony did not amount to ineffective assistance of counsel because the testimony was admissible and, even if it had been inadmissible, it was not outcome-determinative. (239a.) The court also rejected Defendant's claim that the prosecution's comparison of the defense to a "tuna noodle casserole" was not plain error warranting reversal of Defendant's conviction. (239-240a.)

This case is now before this Honorable Court on leave granted. Additional pertinent facts may be discussed in the body of the argument section of this brief, *infra*, to the extent necessary to respond to the claims raised by Defendant.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL WHERE THE PROSECUTOR PROPERLY ELICITED TESTIMONY FROM POLICE OFFICERS REGARDING PRE-ARREST OR PRE-*MIRANDA* SILENCE ON THE PART OF DEFENDANT.

In his brief, Defendant argues that he was "denied his state and federal constitutional rights to due process and a fair trial, where the prosecutor elicited evidence in his case-in-chief of Defendant's post-arrest silence." He also argues that he was "denied his state and federal constitutional right to the effective assistance of counsel, where defense counsel failed to object." (Defendant's Brief on Appeal, p 9.) The People respectfully submit that these claims are without merit.

Preservation of Issue/Standard of Review:

The People disagree with the standard of review cited by Defendant for these claims. Defendant's trial counsel did not object to the cited questions by the prosecutor. Unpreserved claims of constitutional error are reviewed for "plain error." *People v Carines,* 460 Mich 750, 764 (1999), cited in *People v McRunels,* 237 Mich App 168, 171 (1999), *lv den* 461 Mich 949 (2000). Three requirements must be met to avoid forfeiture under this rule:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights.

In addition:

> Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.
> *McRunels, supra* at 171-172 (citing *Carines, supra* at 763-764).

The plain error rule also applies if unpreserved nonconstitutional error occurred. *Carines, supra* at 761-764.

Generally, whether a person has been denied his right to the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc,* 465 Mich 575, 579 (2002). However, where there has been no evidentiary hearing on a claim of ineffective assistance of counsel, review is limited to "mistakes apparent on the record." *People v Davis,* 250 Mich App 357, 368 (2002), *lv den* 467 Mich 909 (2002).

Discussion:

A. *People v Bobo, People v Collier, People v Cetlinski, People v Sutton, and People v McReavy: Where this Court has Permitted Prosecutors to Use a Defendant's Silence.*

In *People v Bobo,* 390 Mich 355 (1973), the defendant was charged with entry without breaking with the intent to commit larceny. At his trial, he took the stand and testified on direct examination that, just prior to being arrested near the scene of the crime, he saw two men run past him. *Id.* at 357. On cross-examination, the prosecutor (over defense counsel's objection) asked the defendant if he had said anything to the police about the two men he had seen running down the street. *Id.* at 358. The prosecutor also commented in his closing argument that the defendant had not told the police about "these two men." *Id.* Defense counsel then moved for a mistrial. *Id.* The trial court denied the motion. *Id.* This Court stated that, "[w]hether his [the defendant's] silence was prior to or at the time of arrest makes little difference—the defendant's Fifth Amendment right to remain silent is constant." *Id.* at 360. This Court reversed the defendant's conviction holding that, "whenever a person is stopped for interrogation by the police, whether technically under arrest or not, the Fifth Amendment guarantees that his silence may not be used against him." *Id.* at 361.

Bobo began to unravel with the United States Supreme Court's decisions in *Jenkins v Anderson,* 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980), and *Fletcher v Weir,* 455 US 603; 102 S Ct 1309; 71 L Ed 2d 490 (1982). When read together, these cases indicate that the federal constitution does not prohibit the introduction of impeachment evidence of a defendant's silence occurring either before or after arrest, so long as the silence did not follow *Miranda* warnings. *Jenkins,* 447 US at 240; *Fletcher,* 455 US at 606. In *Fletcher,* 455 US at 605-606, the Court rejected the proposition that arrest, by itself, was a governmental action which implicitly induces a defendant to remain silent. The Court held that the individual States should decide, using their own rules of evidence, whether post-arrest silence was admissible:

> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.
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> *Fletcher,* 455 US at 606.

In part because of these decisions, *Bobo* has been extensively "clarified" both in this Court and in the Court of Appeals, mostly to delineate what is *not* covered by *Bobo* or, in other words, what is *not* constitutionally protected silence on the part of a defendant.

In *People v Collier,* 426 Mich 23 (1986), the defendant was charged with assault with intent to murder after he stabbed the victim. At trial, the defendant took the stand and testified that he attacked the victim in self-defense. *Id.* at 27. During cross-examination, the prosecutor asked the defendant if he had gone to the police right away to report the incident. *Id.* The defendant replied that he did not report the incident right away because he was concerned that he did not have proper ownership papers for his dog (about which the defendant and the victim had

been arguing) and because he figured that the police would be coming to talk to him anyway. *Id.* at 28. The prosecutor made reference to this testimony in his closing statement to the jury. *Id.* at 28-29. There were no objections. *Id.* at 29. This Court found the prosecutor's questioning/impeachment of the defendant and his reference to the testimony during his closing statement did not refer to constitutionally protected silence, finding that *Bobo* "only applied to those situations where the state seeks to impeach a defendant with his silence maintained during contact with police officers."[10] *Id.* at 31. This Court noted that there, "was no questioning or mention of defendant's silence at or after his contact with the police." *Id.* This Court found that the propriety of impeachment of this type was a simple evidentiary question (i.e. relevance under MRE 401/MRE 402 and probative versus prejudicial value under MRE 403). *Id.* at 32-36.

Use of a defendant's statements or omissions from statements during contact with the police, but before arrest, was at issue in *People v Cetlinski,* 435 Mich 742 (1990). In *Cetlinski*, the defendant's bar burned down and the subsequent police investigation revealed that, three months prior to the fire, the defendant had spoken to one of his employees about finding someone to set fire to the bar. *Id.* at 749-750. At trial, the defendant took the stand and testified that the employee had first brought up burning the bar, that he had only been "joking" with her about setting fire to the bar, that he subsequently told her that he did not want the bar burned, and

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[10] The defendant conceded on appeal that the prosecutor's questioning and comments did not violate the federal constitution. *Id.* at 31, n 1. This Court noted that reliance on the federal constitution had been undercut by *Jenkins v Anderson, supra*, where the United States Supreme Court held that impeachment with pre-arrest silence did not amount to a constitutional deprivation under the Fifth Amendment. As such, the defendant argued that the due process and self-incrimination provisions of the *Michigan* Constitution should be interpreted to preclude impeachment with pre-arrest silence. This Court rejected the defendant's argument noting, "[w]e have been offered no satisfactory arguments why we should be the first to use our own

(continued . . .)

suggested that the employee herself may have been the person who set the fire. *Id.* at 750-751. The defendant also testified that, on the night of the fire, he was awakened by the police at his motel room next to the bar and answered their questions. *Id.* at 751. He was not under arrest at that time. *Id.* at 751 n 16. On cross-examination, the prosecutor asked the defendant why, on both the night of the fire and in subsequent conversations with the police as they were investigating the fire, he had not told the police about the conversations he had had with his employee. *Id.* at 751-752.

This Court noted that, "in light of both pre- and post-*Bobo* decisions of the United States Supreme Court, it is clear that the Fifth Amendment no longer supports the *Bobo* rationale. Thus no error of federal constitutional law occurred." *Cetlinski, supra* at 759. The only question that remained was whether the Michigan Constitution required a "higher standard" by which to analyze the issue. *Id.* at 759. This Court concluded that the Michigan Constitution did not require a higher standard and held that, "[t]he use of a defendant's silence during contact with the police that does not occur at the time of arrest in the face of accusation for impeachment purposes does not violate the Fifth Amendment or the Michigan Constitution." *Id.* at 759-760 (citation, quotation marks, and footnote omitted). As in *Collier,* this Court held that the question was simply an evidentiary one.[11] *Cetlinski, supra* at 759. See also: *People v Hackett,* 460 Mich 202,

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constitution to so enlarge upon existing Fifth Amendment jurisprudence." *Collier, supra* at 36-38.

[11] A majority of the Justices were persuaded that the record of the case was insufficient to determine whether evidentiary error occurred as it had been developed prior to the release of *Collier.* However, in lieu of remanding for further development of the record, this Court found that error, if any, was not prejudicial to the defendant. *Cetlinski, supra* at 761-762.

214 (1999)[12] ("The issue of prearrest silence is one of relevance.")

In *People v Sutton,* 436 Mich 575, 583 (1990), during cross-examination of a police officer, defense counsel began to suggest that the defendant, who was on trial for first degree murder, had initially voluntarily submitted himself to the police and was immediately arrested. Defendant subsequently took the stand and, on direct examination, testified that, when he went to the police department, he was immediately arrested, told he was being charged with first degree murder, and prevented from relating his exculpatory version of events. *Id.* at 583-584. On cross-examination, the prosecutor asked the defendant a series of questions regarding when he had told the police that the shooting at issue had been an accident. *Id.* at 584-585. The prosecutor then recalled a police officer to the stand and asked him, "at any time in 1982, did this defendant, ever, Mr. Sutton, ever, tell you that the shooting at the Fandango Hall was an accident?" *Id.* at 585. The officer responded, "No he did not." *Id.* at 585-586. Defense counsel then asked the officer a series of questions which implied that the officer was lying. *Id.* at 586. The prosecutor then asked the officer whether the defendant had made any statement, and the officer responded, without objection, that after receiving his constitutional rights, the defendant stated that he did not want to make any statements. *Id.* at 586-587. In his closing argument, the prosecutor, without objection, referred to the officer's testimony that the defendant had never made a statement to the police that the shooting was an accident. *Id.* at 587.

This Court held that the prosecutor's questioning and comments at the close of trial were proper. This Court noted, "Defendant cannot assert that the Fifth or Fourteenth Amendment confers a right to create the impression, free from contradiction, that he cooperated with the

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[12] In *Hackett, supra* at 216, this Court noted that pre-arrest silence was not (continued . . .)

police and made a statement after arrest." *Id.* at 591. Rather, "[i]nquiry regarding postarrest post-*Miranda* silence is not error where the prosecutor is seeking not to impeach the defendant's exculpatory silence with silence, but rather to challenge the defendant's trial testimony regarding his postarrest behavior." *Id.* at 598. This Court noted that, while *Bobo* and *Doyle v Ohio,* 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976),[13] protected a defendant's trial testimony from being impeached where the government's impeachment theory is that maintaining silence is inconsistent with innocence, both cases expressly recognized that "the bar to impeachment by silence of exculpatory trial testimony does not extend to impeachment with a refusal to speak during interrogation which is inconsistent with defendant's own statements at trial claiming that he made postarrest statements while in custody." *Sutton, supra* at 591.

In *People v McReavy,* 436 Mich 197, 204 (1990), the defendant was charged with armed robbery. At trial, several police officers called to the stand by the prosecution testified that, after twice being given his *Miranda* rights, the defendant agreed to speak with the officers. *Id.* at 205. One of the officers testified "that the defendant did not respond to direct questions regarding the robbery or deny his involvement, but simply put his head in his hands and looked down, that he didn't respond yes or no to those questions." *Id.* Defense counsel's objection was overruled. *Id.* at 206. The prosecutor made reference to this testimony in his closing argument to the jury. *Id.* at 208.

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constitutionally protected even if it had been used in the case as substantive evidence.

[13] In *Doyle,* 426 US at 619 n 11, the United States Supreme Court found that post-arrest, post-*Miranda* silence has no probative value as long as a defendant does not claim that the he told the police the same version of events upon arrest. The Court noted that, in most situations, post-arrest post-*Miranda* silence has no probative value because, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Doyle,* 426 US at 617.

This Court noted that the case "presents the constitutional issue addressed in *Miranda,* that is, the substantive use of a defendant's statements and comments on a defendant's behavior, demeanor, and nonresponsive conduct after a valid waiver of his Fifth Amendment privilege against compelled self-incrimination." *Id.* at 211. This Court concluded that "a description of a defendant's behavior which serves to explain the circumstances and conduct of a defendant who has not invoked his right to remain silent will not be considered improper comment on the defendant's post arrest silence." *Id.* at 217 (quotation marks and citation omitted). This Court reasoned:

> The Fifth Amendment does not preclude substantive use of testimony concerning a defendant's behavior and demeanor during a custodial interrogation after a valid waiver of his Fifth Amendment right against compelled self-incrimination. When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent. Moreover, a defendant's nonverbal conduct cannot be characterized as "silence" that is inadmissible per se under the Michigan Constitution. When constitutional obligations are fulfilled, use of a party opponent's statements and conduct are to be evaluated pursuant to MRE 801.
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> *Id.* at 221-222.

This Court noted that had "the defendant refused to say *anything* after being given his *Miranda* warnings, testimony about that refusal would have been improper." *Id.* at 217-218 (emphasis added).[14]

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[14] In fact, this Court recently addressed such a situation in *People v Doyle,* 464 Mich 567 (2001). In *Doyle,* a police officer testified at trial that he had attempted to interview the defendant after his arrest and being advised of his *Miranda* warnings, but the defendant told the officer that he wished to speak to an attorney prior to any questioning. *Id.* at 570. This Court found that, on the specific facts of the case before it (the limited nature of the improper testimony, the lack of any effort by the prosecutor to improperly use the defendant's invocation of his *Miranda* rights against him, the trial court's "strong" curative instruction, and the fact that

(continued . . .)

B. *People v Schollaert: A Proper Next Step.*

The question presented in *People v Schollaert,* 194 Mich App 158, 164 (1992), was "whether the admission as substantive evidence of testimony concerning a defendant's silence before custodial interrogation and before *Miranda* warnings have been given is a violation of the defendant's constitutional rights." The court noted that this issue had not been "directly addressed" by this Court in *Sutton, Cetlinski,* or *McReavy. Schollaert, supra* at 164.

In *Schollaert, supra* at 160, police officers went to the defendant's home at 3:30 a.m. shortly after some murders had been reported in order to take the defendant in for questioning. At trial, during the case-in-chief, the prosecutor asked one of the police officers whether the defendant said anything while they were in the home (i.e. why they were at the home in the middle of the night). Another officer testified that he asked the defendant if he would be willing to go the station for questioning and, after the defendant agreed to do so, the defendant did not ask what was going on until he was in the police car. *Id.* at 160-161. During his closing argument, the prosecutor commented on the defendant's failure to question why the officers were at his home. *Id.* at 161.

The court concluded that, on the basis of *Sutton, Cetlinski,* and *McReavy,* as well as "certain federal precedent decided since *Bobo,*" no error had occurred because the admission as substantive evidence of testimony concerning a defendant's silence before custodial interrogation and before the *Miranda* warnings is not a violation of a defendant's constitutional rights. *Schollaert, supra* at 164. The court's succinct reasoning merits quoting at length:

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the defendant did not testify, and therefore was not impeached with post-*Miranda* silence) reversible error had not occurred. *Doyle,* 464 Mich at 573-583. See also: *People v Sholl,* 453 Mich 730, 738 (1996).

The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial. The Fifth Amendment privilege has been extended beyond criminal trial proceedings "to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v Arizona,* 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 86 (1966).

As Justice Stevens, concurring in *Jenkins v Anderson,* 447 US 231, 243-244; 100 S Ct 2124; 65 L Ed 2d 86 (1980), noted:

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. When a citizen is under no official compulsion whatever, either to speak or remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

See also Justice BOYLE'S concurring opinion in *People v Collier,* 426 Mich 23, 39-40; 393 NW2d 346 (1986).

In the present case, when the sheriff's deputies entered defendant's home, defendant was not in a custodial interrogation situation where he was compelled to speak or assert his right to remain silent. Although defendant was the focus of the police investigation at that point, the relevant inquiry is whether he was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way. *Beckwith v United States,* 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976); *People v Hill,* 429 Mich 382; 415 NW2d 193 (1987).

Assuming that the presence of the police officers in defendant's home significantly deprived him of his freedom of action so that he could be found to be in police custody, there is nothing in the record to indicate that he was subjected to

interrogation or questioning while in his home or that his silence was in reliance on the *Miranda* warnings. See *United States v Rivera,* 944 F2d 15632, 1568 (CA 11, 1991), where the court found that no constitutional difficulties arose out of the presentation as substantive evidence of testimony concerning the defendant's silence before or after his arrest, but before the defendant was given *Miranda* warnings. Compare *Wainwright v Greenfield,* 474 US 284, 295; 106 S Ct 634; 88 L Ed 2d 623 (1986), where the Supreme Court held that the use of a defendant's postarrest, post-*Miranda* silence as substantive evidence of his sanity was a violation of the Due Process Clause of the Fourteenth Amendment.

This case is analogous to the situation in *McReavy, supra.* In *McReavy,* the Court found that because the defendant had previously waived his rights, there was no basis to conclude that his nonresponsiveness was attributable to the invocation of his Fifth Amendment privilege or a reliance on the *Miranda* warnings. Therefore, the Court concluded that admission of evidence regarding the defendant's demeanor during questioning was not a violation of his Fifth Amendment right not to incriminate himself. The Court noted in *McReavy, supra* at 221, n 28:

> The dissent erroneously characterizes the testimony of the detectives in this case as comments on periods of silence which are constitutionally protected, even though silences so protected are those in which a defendant has exercised the right to remain silent.

In the present case, defendant's silence or nonresponsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings. Therefore, we believe that defendant's silence, like the "silence" of the defendant in *McReavy,* was not a constitutionally protected silence. On the basis of our reading of the Michigan Constitution, together with developments in Fifth and Fourteenth Amendment jurisprudence, we conclude that defendant's constitutional rights were not violated when evidence of his silence was admitted as substantive evidence.

Schollaert, supra at 164-167.

Because the testimony regarding the defendant's conduct did not involve constitutionally protected silence, the court addressed whether, as a simple evidentiary issue, the testimony was admissible. The court concluded that the evidence *was* admissible:

> Defendant's failure to question the presence of the deputies was relevant as evidence of his consciousness of guilt. See, e.g., *McReavy, supra* at 203. Furthermore, we note that the testimony regarding defendant's failure to question why the sheriff's deputies were at his home was not contrary to *People v Bigge,* 288 Mich 417; 285 NW 5 (1939). The rule in *Bigge* precludes the admission of evidence of a defendant's failure to say anything in the face of an accusation as an adoptive or tacit admission of the truthfulness of the accusation under MRE 801(d)(2)(B) unless the defendant has "manifested his adoption or belief in its truth." See *McReavy, supra* at 213. In the present case, defendant's failure to question the presence of the deputies at his home at 3:30 A.M. was not allowed into evidence as a tacit admission of any accusation. Rather, defendant's demeanor was admitted as substantive evidence that was relevant to a determination of defendant's guilty knowledge. We find no error.
>
> *Schollaert, supra* at 167.

When the defendant attempted to take his claim of error further, this Court denied his application for leave to appeal. *People v Schollaert,* 441 Mich 872 (1992). Subsequent panels of the Court of Appeals have followed *Schollaert* and not indicated any disagreement with its reasoning.[15] See *People v Dunham,* 220 Mich App 268, 274 (1996), *lv den* 456 Mich 873 (1997); *People v Stewart (On Remand),* 219 Mich App 38, 43 (1996), *lv den* 456 Mich 866 (1997).

This Court should take this opportunity to now formally adopt the holding of *Schollaert* and apply it to the facts of this case. *Schollaert* is entirely consistent with this Court's series of decisions that began in 1986 with *Collier* and continued in 1990 with *Cetlinski, Sutton,* and *McReavy.* Starting with *Collier,* this Court has corrected the impression left by *Bobo* that all silence on the part of a defendant was constitutionally protected. *Schollaert* simply presents another scenario where silence on the part of a defendant is not constitutionally protected—

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[15] While subsequent panels of the Court of Appeals were bound to follow *Schollaert* [see MCR 7.215(H)(1)], there is a procedure by which panels that follow the decision *only* because of
(continued . . .)

silence that may occur in the presence of police officers, but that is *not* induced by the assurances of *Miranda* warnings or is in response to custodial interrogation.

Furthermore, adoption of *Schollaert* would be consistent with the United States Supreme Court's decisions in *Jenkins* and *Fletcher.* This Court has already recognized that the Michigan Constitution does not provide any greater protection in this area than the federal constitution. *Cetlinski, supra* at 759.[16] Rejection of *Schollaert* would clearly be inconsistent not only with *Jenkins* and *Fletcher*, but also with this Court's prior holdings.

Finally, adoption of *Schollaert* will enhance the truth-seeking function of trials by permitting juries to consider behavior of a defendant that is not constitutionally protected to assist in deciding the factual question of the defendant's guilt. To this end, "[t]he protective shield of the Fifth Amendment should [not] be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *People v Fields,* 450 Mich 94, 109 (1995), quoting from *United States v Hastings,* 461 US 499, 515; 103 S Ct 1974; 76 L Ed 2d 96 (1983) (Stevens, J. concurring).[17]

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the court rule can indicate that they are doing so in a published opinion [MCR 7.215(H)(2)]. However, no panels of the Court of Appeals have done so.

[16] Thus, the fact that some state courts have ruled contrary to *Schollaert* is irrelevant. For example, in *State v Hoggins,* 718 So2d 761 (Fla 1998), the Florida Supreme Court held that *Florida's* constitution placed more rigorous constraints on the use of a defendant's post-arrest, pre-*Miranda* silence than does the United States Constitution. The Court noted that the Florida Constitution had been interpreted in this manner both before *and* after *Jenkins* and *Fletcher. Id.* at 768. Again, *this* Court has already stated that the *Michigan* Constitution provides a defendant no greater protection in this area than the federal constitution.

[17] Given that so little of *Bobo's* broad holding is left, this Court should take this opportunity to overrule *Bobo* and, instead, use this case to state where prosecutors can and cannot use a defendant's "silence" under the US Const, Am V and Const 1963, art 1, § 17 as interpreted by *Collier, Cetlinski, McReavy,* and *Schollaert.*

C. *Applying Schollaert to the Facts of This Case.*

Defendant argues that testimony from some of the police officers involved in this case that he (Defendant) had not told the officers that he had blacked out, could not remember what had occurred, or that he had lost control of his vehicle due to mechanical problems, were improper references to post-arrest, post-*Miranda* silence in which the jury could infer Defendant's guilt. (Defendant's Brief on Appeal, p 11.)

During direct examination of Sergeant Hillman during the prosecutor's case-in-chief, the following colloquy occurred:

> Q Who was it that transported or placed the Defendant under arrest?
> A Officer Cacicedo.
> Q You did not transport the Defendant to the station?
> A No.
> Q At any point in time that you were at the scene that evening, in the company of the Defendant, did he ever fall to the ground?
> A No.
> Q Did you ever see him pass out?
> A No.
> Q Did he ever vomit?
> A No.
> Q Did he ever indicate to the best of your knowledge during the scene that he had blacked out?
> A No.
> Q Did he ever indicate to you at the scene that he couldn't remember what happened?
> A No.
>
> (107-108a.)

During direct examination of Officer Cacicedo during the prosecutor's case-in-chief, the following colloquy occurred:

> Q At any point in time that evening, did the Defendant indicate to you that he had lost control of the truck?
> A No.

Q Did he ever indicate to you that there was any mechanical defect with the truck?
A No.
Q Did he ever indicate to you that he had blacked out that evening?
A No.
Q Did he ever indicate to you that he couldn't remember things that happened that evening?
A No.

(130a.)

During direct examination of Officer Siladke in the prosecutor's case-in-chief, the following colloquy occurred:

Q Did you ever see him [Defendant] fall down?
A No.
Q Pass out?
A No.
Q Vomit?
A No.
Q Indicate that he didn't know what was going on?
A No.
Q Indicating that he had blacked out?
A No.
Q Indicating that he couldn't remember?
A No.

(146-147a.)

First, when read in context, some of this testimony involved "silence" by Defendant *prior to his arrest* or, in other words, silence that is not constitutionally protected. *Cetlinski, supra; Hackett, supra* at 214, 216. Sergeant Hillman's *only* contact with Defendant was at or near the scene of the crime. He neither arrested Defendant nor transported him to the police station. (107a.) Rather, Sergeant Hillman stopped Defendant's vehicle, had him exit the vehicle, and observed a series of field sobriety tests being performed. (99-102a.) Officer Cacicedo likewise had contact with Defendant at the scene of the crime as he was the officer who patted Defendant down after his vehicle was stopped, had Defendant perform the sobriety tests, and administered

the preliminary breath test (PBT) to Defendant. (113-120a.) Finally, Officer Siladke was also present at the scene of the crime and observed Defendant being asked to step out of his vehicle, performing the sobriety tests, and being arrested. (143-144a.)

Although both Officers Cacicedo and Siladke had some contact with Defendant following his arrest, if their testimony did refer to Defendant's post-arrest silence, it was not a constitutionally protected silence under *Schollaert* as it occurred *prior* to any custodial interrogation and the necessity for *Miranda* warnings. Officer Cacicedo transported Defendant from the scene to the Madison Heights Police Department and then to the hospital in order to have blood drawn pursuant to a search warrant and back to the police station. (126-130a.) At the Madison Heights Police Department, where Defendant was taken following his arrest, Officer Siladke read Defendant his chemical test rights. (144-146a.) He also accompanied Officer Cacicedo in transporting Defendant to the hospital to have his blood drawn. (150a.) It was not until the *next day* that Defendant was interrogated by the police and gave a statement. Neither Officer Cacicedo nor Officer Siladke participated in the police interrogation of Defendant.[18] Further, there is nothing on the record of this case indicating that Defendant was subject to interrogation or questioning during any contact that Officers Cacicedo and Siladke had with Defendant or that his "silence" during this contact was in reliance on *Miranda* warnings. Consequently, any "silence" referred to by these witnesses was not a constitutionally protected silence.

[18] Defendant does not claim that the prosecutor asked any improper questions of those officers who interrogated Defendant (Sergeants Cupp and Jorgenson).

Defendant argues that "the record is silent regarding whether Miranda warnings were given promptly upon Defendant's arrest" and that, "[a]t a minimum, this case should be remanded to develop a record to determine whether Miranda warnings were given." (Defendant's Brief on Appeal, 15.) The People disagree with this argument for several reasons. First, there is no requirement that a defendant be read his *Miranda* warnings "promptly upon . . . arrest." Rather, *Miranda* warnings "are necessary only when the accused ***is interrogated while in custody*** . . . ." *People v Herndon,* 246 Mich App 371, 395 (2001), *lv den* 465 Mich 968 (2002) (emphasis added), citing to *People v Hill,* 429 Mich 382-387-393 (1987). See also *People v Ish,* 252 Mich App 115, 118 (2002). The record of this case indicates that Defendant was not interrogated until the next afternoon.[19] Thus, there would have been no need for the police to have given Defendant his *Miranda* rights any earlier. Second, the record of this case is not unclear as to whether Defendant was given his *Miranda* warnings promptly upon his arrest. People's Exhibit 6, a videotape recorded by the video system installed in Officer Siladke's patrol vehicle (which was admitted into evidence without objection), not only shows the police administering the field sobriety tests and preliminary breath test to Defendant, but *also* shows Defendant being placed under arrest and placed in another patrol vehicle. At no time on this tape are the officers seen or heard advising Defendant of his *Miranda* rights. Thus, there is no basis

[19] The fact that Officer Siladke may have questioned Defendant regarding his chemical test rights does not constitute "interrogation." "[I]nterrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v Marsack*, 231 Mich App 364, 374 (1998), *lv den* 460 Mich 869 (1999), *cert den* 528 US 957; 120 S Ct 387; 145 L Ed 2d 302 (1999), citing *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). Officer Siladke was not seeking to elicit an incriminating response from Defendant in questioning him to establish his understanding of his chemical test rights. Thus, Defendant was not "interrogated" by Officer Siladke as that term is legally understood.

for this Court to remand this case to further develop the record.

In short, under *Schollaert,* the prosecutor's questions of Sergeant Hillman, Officer Cacicedo, and Officer Siladke did not reference constitutionally protected silence. Defendant's claim to the contrary is without merit.

The only question is whether evidence of Defendant's "silence" at the times at issue is admissible under the Michigan Rules of Evidence. *Schollaert, supra* at 167. MRE 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." MRE 401 defines relevant evidence as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 403 states that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, Defendant's failure to, at the scene or early on in his contacts with the police, indicate that he had blacked out, could not remember what happened, or had a mechanical problem with his vehicle was properly admissible as evidence of Defendant's consciousness of guilt. See: *Schollaert, supra* at 167. If Defendant had actually blacked out and accidentally struck Harold Van Dorn or accidentally struck Van Dorn because the steering and/or brakes on his truck malfunctioned, one would expect that he would have unhesitatingly told the police at the very first opportunity, "I blacked out" or "I could not control my truck." Instead, however,

Defendant said nothing. As such, Defendant's silence in his early contacts with the police is extremely relevant to showing that Defendant was in fact guilty of intentionally striking Harold Van Dorn and that it was not an accident due to an alcoholic blackout or mechanical problems with the truck. Given the highly probative nature of this evidence, its probative value was not outweighed by the danger of unfair prejudice. As such, evidence concerning that silence was admissible under the Michigan Rules of Evidence.

D. Error, If Any, Does Not Require Reversal of Defendant's Conviction.

Even if this Court rejects *Schollaert,* and thereby finds that Defendant's silence following his arrest but before *Miranda* warnings was constitutionally protected, this error would not require reversal of Defendant's conviction. In addition, if this Court finds that evidentiary error occurred, reversal of Defendant's conviction would not be required. In both circumstances, the "plain error" rule would be applied. *Carines, supra* (see standard of review discussion, *supra*).

In this case, as described in the counter-statement of facts *supra,* there was overwhelming evidence of Defendant's guilt (eyewitnesses who saw Defendant strike Van Dorn with his truck in a very intentional manner, a witness who saw that Defendant had no marks on his face only minutes earlier), such that three colloquies regarding Defendant's pre-*Miranda* silence could have been of no consequence, especially when the prosecutor made no reference to this silence his closing statements to the jury. (see 25-43b.) In the alternative, if the jury's verdict in this case (guilty of second degree murder instead of first degree premeditated murder) indeed reflects that the jury believed that Defendant either suffered from an alcoholic blackout at the time he struck Harold Van Dorn or lost control of a truck with poor steering and/or brakes, then the jury obviously discounted or ignored the prosecutor's attack on Defendant's defense with his pre-*Miranda* silence and used Defendant's defense to acquit Defendant of first degree murder.

In either situation, under the plain error rule, Defendant is not entitled to reversal of his conviction.

E. *Defendant was Not Denied his Right to the Effective Assistance of Counsel.*

Defendant's claim of ineffective assistance of counsel is also without merit. Defendant claims that his trial counsel was "clearly ineffective . . . by failing to object to the prosecutor's elicitation of Defendant's post-arrest silence." (Defendant's Brief on Appeal, p 16.) This claim is without merit.

In order to establish a claim of ineffective assistance of counsel, a defendant must overcome the strong presumption that his counsel's actions were sound trial strategy and that, but for the purported error, the outcome of the trial would have been different. *Davis, supra* at 368-369. Because there was no error—constitutional or otherwise—in the prosecutor's questions of the police officers regarding Defendant's pre-*Miranda* silence, any objection by Defendant's trial counsel would have been overruled. Counsel is not required to make futile objections. See: *Ish, supra* at 118-119; *People v Armstrong,* 175 Mich App 181, 189 (1989) ("Counsel is not ineffective for failing to make a futile objection"). Further, even if counsel had objected and the objection was sustained, the outcome of the trial would not have been different for the reasons discussed, *supra.*

In short, Defendant was not denied his right to the effective assistance of counsel on the facts of this case.

F. *Conclusion.*

This Court should take this opportunity to continue what it began in 1986 with *People v Collier, supra,* and hold, as the Court of Appeals did in *People v Schollaert, supra,* that the admission as substantive evidence of testimony concerning a defendant's silence before *Miranda*

warnings and custodial interrogation is not a violation of a defendant's constitutional rights and that the admissibility of such evidence should be analyzed under the Michigan Rules of Evidence. Some of the testimony at issue clearly involved "silence" by Defendant *prior to his arrest* or, in other words, silence that this Court has already held is not constitutionally protected. *Cetlinski, supra.* If some of this testimony did refer to post-arrest silence on the part of Defendant, it still was not constitutionally protected under *Schollaert* as it involved silence before Defendant was advised of his *Miranda* warnings. However, even if this Court were to hold that post-arrest, pre-*Miranda* silence is constitutionally protected in Michigan or that evidentiary error occurred, the admission of testimony concerning this silence, for which there was no objection, was not plain error requiring reversal of Defendant's conviction. Finally, Defendant was not denied his right to the effective assistance of counsel.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by John S. Pallas, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm Defendant's conviction and sentence in the Oakland County Circuit Court.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: 

JOHN S. PALLAS (P42512)
Assistant Prosecuting Attorney

DATED: March 11, 2003